STATE OF MICHIGAN

COURT OF APPEALS

NEOCARE HEALTH SYSTEMS, INC, Plaintiff-Appellees,	UNPUBLISHED January 26, 2006
v	No. 255558 Wayne Circuit Court
MERCEDES TEODORO, Defendant-Appellant.	LC No. 02-204-125-CK

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from the denial of her motion for summary disposition pursuant to MCR 2.116(C)(8) and subsequent jury verdict in favor of plaintiff. We affirm.

Plaintiff filed the instant action alleging that defendant, a registered nurse previously employed by plaintiff, agreed to a noncompetition provision as a condition of her employment with plaintiff, which she breached by soliciting plaintiff's patients and/or rendering treatment to them on behalf of her own home health care company. The noncompetition provision at issue provides:

> The employee understands that the patients he/she will be rendering services to are patients of [plaintiff]. The employee understands that [plaintiff] has a legitimate business reason for maintaining relationships with patients. As such, in the event that the employee's employment with [plaintiff] ends or is terminated (for any or no reason), employee agrees that for a period of 5 years (measured from the employee's last date of actual employment with [plaintiff]) that the employee will not solicit any patients of [plaintiff] (including, but not limited to patients treated by the employee), nor will the employee render any home health or related health care services to any patients or former patients of [plaintiff] (as an employee of another agency, as an independent contractor, as a self employed person, or through a corporation, partnership or any other business enterprise). Given the unique nature of the home health business, the employee agrees that this is a reasonable restriction.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) asserting, among other things, that this provision was precluded by 42 USC 1395(a), which provides that a Medicare beneficiary may seek services from any Medicare qualified provider;

that it was overbroad and, therefore, was unenforceable under Michigan law; and that enforcement of the provision was precluded by public policy. In response, plaintiff argued that the noncompetition provision was not precluded by 42 USC 1395(a), which allows a Medicare provider the discretion to decline to treat a recipient and was not overly broad or void as against public policy; plaintiff attached documents and deposition testimony to this response, to establish that defendant solicited and treated several of plaintiff's patients in violation of the noncompetition provision. The trial court denied defendant's motion, concluding that the agreement was not precluded by 42 USC 1395(a), and that it had no information that the noncompetition provision was out of line with reasonable noncompete clauses in the industry or otherwise indicating that the agreement would prevent defendant from continued employment as a home health care nurse.

On appeal, defendant argues that the trial court erred in denying her motion for summary disposition pursuant to MCR 2.116(C)(8). We disagree.

This Court reviews the trial court's denial of defendants' motion for summary disposition de novo. *Adair v State*, 470 Mich 105, 119; 680 NW2d 386 (2004). A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the pleadings alone to determine whether the plaintiff has stated a claim on which relief can be granted. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 507; 667 NW2d 379 (2003). All factual allegations in support of the claim are accepted as true and, together with any reasonable inferences or conclusions which can be drawn from them, they are construed in a light most favorable to the nonmoving party. *Adair, supra* at 119; *Alan Custom Homes, supra* at 508. The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Adair, supra* at 119.

MCL 445.774a(1) provides that:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent that any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

Thus, "[a]n employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business." MCL 445.774a(1); *Bristol Window and Door, Inc v Hoogenstyn*, 250 Mich App 478, 485-486; 650 NW2d 670 (2002). Agreements not to compete in employment situations are permissible as long as they are reasonable. *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). As noted in *Superior Consulting, Co, Inc v Walling*, 851 F Supp 839, 847 (ED Mich 1994), to be enforceable under Michigan law, a noncompetition provision must be tailored such that the scope of the agreement, considering duration, geographical area and type of employment or line of business restricted, is

no greater than reasonably necessary to protect the employer's reasonable business interests. Thus, we must determine whether a provision that restricts defendant from soliciting or providing "home health or related health care services" to plaintiff's current or former patients for a period of five years reasonably protects plaintiff's legitimate business interest in protecting its patient base.

Defendant argues that the noncompete agreement is overbroad as to duration, line of business, and geographic area. Contrary to defendant's characterization, however, the provision does not restrict her ability to seek employment or to engage in any line of business; defendant is free to engage in any line of business she so chooses, including a full range of home health care services so long as she does not solicit or treat plaintiff's patients and former patients. The agreement clearly permitted defendant to work as a home health care nurse, and allowed her to provide any non-health care services to anyone of her choosing, including plaintiff's patients and former patients. Therefore, we conclude that for purposes of MCR 2.116(C)(8) review the provision is not overbroad with regard to type of employment or line of work.

Further, the fact that the provision contains no geographic limitation does not render it unreasonable under the circumstances. Because defendant was not prevented from any employment or from engaging in any line of business, no geographic limitation was necessary. The noncompetition provision requires that defendant not treat plaintiff's patients; defendant remains free to treat anyone else, any where at any time, and was permitted to, and did, open her own competing company in proximity to plaintiff's place of business. Thus, as noted by the trial court, absent a showing that plaintiff occupied such a large share of the home health care market so as to greatly reduce the number of patients available to defendant, we find no basis for concluding that the agreement was unreasonable as a matter of law because it did not provide a specific geographic limitation.

Defendant also challenges the duration of the agreement, asserting that five years is unreasonable as a matter of law. However, defendant does not provide this Court with any authority indicating that a five-year duration is patently unreasonable. Rather, whether the duration of the provision was reasonable is to be determined based on the nature of the industry and the scope of the restraint on plaintiff's activities. MCL 445.774a Given the nature of the home healthcare industry, plaintiff's employees are necessarily in the position to develop personal relationships with plaintiff's patients when treating them on plaintiff's behalf and, as apparently was done in this case, can easily solicit plaintiff's patients for a competing entity while still employed by plaintiff. In this context, we find that the noncompetition provision at issue was appropriately limited to reasonably protect plaintiff's interest in its patient base. The provision allowed defendant to continue employment as a home health care nurse and even permitted her to open her own home health care business in the same geographic vicinity as plaintiff. Defendant has presented nothing indicating that this noncompete provision was out of line with reasonable noncompete clauses within the home health care industry, nor that it would

preclude defendant from otherwise practicing as a home health care nurse. Thus, we concur with the trial court that the agreement was not unreasonable as a matter of law.[1]

Defendant also argues that the noncompete provision is invalid as a matter of public policy because it infringes upon a patient's right to choose a provider as set forth in 42 USC 1395(a). We disagree. 42 USC 1395(a) allows a patient to choose their health care provider, so long as that provider agrees to provide service to the patient; it does not give the patient an absolute right to the provider of their choosing, but allows providers to decline to undertake the provision of services. Thus, 42 USC 1395(a), does not conflict with state law that allows for reasonable noncompetition agreements. Further, we agree with the trial court that 42 USC 1395(a) addresses a patient's right to choice – not a provider's freedom to treat – and any complaints resulting from restrictions imposed by the noncompetition agreement belong to the patients and not to defendant. That is, having agreed to the noncompetition agreement in exchange for valuable consideration, defendant should not now be heard to claim that the agreement is void as between the parties because it restricts the rights of other, nonparties to choose defendant as their home health care provider.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

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[1] We note that defendant also argues that the trial court improperly found that the noncompete agreement was reasonable as a matter of law. However, defendant did not properly raise this issue. At trial, the trial court noted that there was no question as to whether the noncompete provision constituted an unfair restraint on trade because the issue had already been decided during the motion for summary disposition. Thus, the trial court limited the question on this claim to damages. Defendant did not dispute this at trial, but raised it for the first time in a motion for reconsideration after the verdict. Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Muci v State Farm Mutual Automobile Ins Co*, 267 Mich App 431, 442-443; 705 NW2d 151 (2005). To preserve most issues, a party must object below. *Tringali v Lal*, 164 Mich App 299, 306; 416 NW2d 117 (1987). Objections must be timely, and specify the same ground for challenge as the party seeks to assert on appeal. *Klapp v United Ins Group Agency (On Remand)*, 259 Mich App 467, 475; 674 NW2d 736 (2003). Because defendant by either plan or negligence failed to object at a proper time, we find no reversible error. Further, we find that the trial court did not abuse its discretion in denying defendant's motion for reconsideration when defendant presented no reasons as to why she waited until after the verdict to raise this issue. See *Detroit Chief Financial Officer v Detroit Policemen & Firemen Retirement Sys Bd of Trs*, __ Mich App __; __ NW2d __ (Docket No. 254516, issued January 12, 2006) at slip op, pp 15-16.